88-1920

Supreme Court, U.S.
FILED
MAY 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
COURT OF THE UNITED STATES
OF AMERICA

TERM _____

THE AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation;
and
KEITH MILTON RHINEHART,
a single person;

Petitioners,

v.

LAW OFFICES OF
EDWARDS AND BARBIERA,
a professional service corporation;

Respondents.

ON PETITION FROM THE SUPREME COURT OF THE
STATE OF WASHINGTON

PETITION FOR CERTIORARI

Counsel for Appellants:
JEAN SCHIEDLER-BROWN
Law Offices of Jean Shiedler-Brown Assoc., PS.
606 Post Ave., Suite 101
Seattle, WA 98104
(206) 223-1888

QUESTION PRESENTED

Does it violate a Defendant's constitutional right to Due Process to strike Defendant's answer and enter a default judgment as a sanction for failure to produce discovery where the discovery has no relation to the merits of the case?

PARTIES TO THE PROCEEDING

All parties to the proceeding are included in the caption.

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Sneidegar v. Hodderson, 53 Wn. App. 476 [Feb. 1989]

Societe International Pour Participations Industrielle et commercials, S.A. v. Rogers, 357 US 197, 2 L.Ed 2d 125, 78 S. Ct. 1087 [1958]

US Constitution, Amendment 14 - Washington Civil Rule of Procedure 37 (b)(2)(c).

GROUNDS OF JURISDICTION

Edwards and Barbieri sued Aquarian Foundation for attorneys fees. The trial court dismissed the action when Plaintiffs failed to produce co-defendants' addresses [Appendix A]. A motion to vacate was filed and denied on March 19, 1987.[Appendix B] The appeal was filed in State of Washington Court of Appeals. The Court of Appeals affirmed the trial court by commissioner Ruling April 11, 1988. [Appendix C] A motion of reconsideration was denied [Appendix D], and the State Supreme Court denied a petition for review on February 28, 1989 [Appendix E].

Jurisdiction is conferred in this court by 28 USC 2101 [C], and 28 USC 1257.

PROVISIONS AND STATUTES INVOLVED IN APPEAL

United States Constitution--

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STATEMENT OF THE CASE

Petitioner, Aquarian Foundation, is a non-profit Spiritual Church incorporated under the laws of the State of Washington in 1955. CP 1[1]. Petitioner Keith Milton Rhinehart is a member and official of the Church. CP 215. The original action in this case was brought by the Law Office of Edwards and Barbieri in July 1985. CP 1. Edwards & Barbieri brought the action seeking to recover fees allegedly owed to them for legal services. CP 3-4. Edwards & Barbieri had also represented other parties associated with the Aquarian Foundation. CP 3-4.

The Aquarian Foundation and Reverend Rhinehart denied liability for certain fees for representation of other Defendants. Edwards & Barbieri amended its complaint and joined five of the other parties as Defendants. CP 22, CP 27-29.

Edwards & Barbieri served interrogatories on Petitioners requesting the address and telephone number of two of the added Defendants, Steven and Lillian. Young. CP 37. The Aquarian Foundation and Reverend Rhinehart objected to providing the information regarding the Youngs on the grounds that it unduly infringed upon their constitutional rights of privacy and association, and that it would be a violation of the Priest-Penitent Privilege. CP 47. Petitioners also resisted disclosure on the grounds it would endanger the Youngs, who had been subjected to threats of harm. CP 47.

After Petitioners failure to produce discovery, on October 16, 1985, Judge George Mattson ordered Petitioners answer to be stricken and they be deemed in default. CP 207. The Aquarian Foundation and Reverend Keith Milton Rhinehart subsequently deposited $70,000.00 in the court Registry in lieu of a supersedeas bond. CP 171. On October 25, 1985 Judge Jerome Johnson entered default judgment in the amount of $50,317.70 jointly and severally against Defendants. CP 207-209. The judgment included an award of $7,975.50 for attorney fees.

Defendants' answer and amended answer questioned the value of the legal services; Defendants asserted that plaintiffs abandoned legal representation in another litigation matter and refused to prosecute the case; Defendants asked for damages in

---

[1]Reference to CP is to Clerk's Papers in the State Appellate Court

the amount proven at trial. CP 196. These claims were all decided against the Aquarian Foundation and Reverend Rhinehart without any evidentiary hearing on the claims when the Court struck their answer and entered a default judgment against them for violating a discovery order. CP 214.

Petitioners appealed the default judgment on December 19, 1985, and asserted that the order striking their answer and entering a default was improper, claiming the Order Compelling Discovery denied Petitioners fundamental rights of privacy, freedom of association and free exercise of religion. The issue that striking Defendants' answer constituted a denial of due process was never raised in the Trial Court, nor was it raised on appeal to The Court of Appeals. New counsel was substituted and the issue was presented on Petition to the Supreme Court of Washington. Review was denied, and the Jurisdictional Statement to the U.S. Supreme Court was dismissed. (Case #87-302).

The Aquarian Foundation and Reverend Rhinehart brought as Motion to vacate which was denied by the Trial Court on March 19, 1987. CP 311. That motion raised the due process issue, i.e., that property had been taken without due process and thus the judgment should be vacated as void and/or manifestly unjust.(See Appendix H).

On April 11, 1988 the Commissioner of Division 1 of the Court of Appeals of the State of Washington granted a Motion on the Merits. The Commissioner found that the issues presented by the Aquarian Foundation and Reverend Rhinehart were clearly controlled by settled case law. (Appendix C) The Motion to modify was denied November 21, 1988. Appendix D. Petition for review to The State of Washington Supreme Court was denied on February 28, 1989.(Appendix E).

QUESTION TIMELY RAISED ON APPEAL

As evidenced in the Commissioner's ruling, Appendix C, this issue was prosecuted on appeal in a timely fashion. It was also raised on petition for Review to the State Supreme Court. See Appendix I.

REASONS WHY CERTIORARI SHOULD BE GRANTED

THE WASHINGTON COURT DENIED PETITIONERS DUE PROCESS TO LAW.

QUESTION PRESENTED: DOES IT VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS TO STRIKE DEFENDANT'S ANSWER AND ENTER A DEFAULT JUDGMENT AS A SANCTION TO PRODUCE DISCOVERY WHERE THE DISCOVERY HAS NO RELATION TO THE MERITS OF THE CASE?

1. IN APPLYING ITS OWN CASES, THE WASHINGTON COURT VIOLATED PETITIONERS' RIGHTS TO DUE PROCESS.

Originally, a default judgment was entered in the present case for failure to produce the address of Co-defendants, Steve and Lillian Young. In Mitchell v. Watson, 58 W.2d 206, 361 P.2d 744 [1961], the Washington State Court considered the propriety of entering a default judgment against a Defendant in a civil case as a sanction for failure to comply with a court order compelling the Defendant to answer a written interrogatory. The Defendant in that case was a newspaper columnist who had published allegedly libelous material. The Defendant had refused to provide him with the information he printed.

In deciding in Mitchell that the default judgment was improper, this Court relied upon several earlier decisions. In Lawson v. Black Diamond Coal Mining Co. 44 W.2d 26, 86 P.2d 1120 [1920]. the Trial Court, operating under an earlier statute, entered a default judgment against a Defendant which failed to comply with an order to give more specific answers to certain interrogatories. In reversing the judgment the Court there stated:

> The appellant earnestly insists that [the particular application of the statute] deprives it of its property without due process of law, in violation of Sec. 1 of the Fourteenth Article of Amendment to the Constitution of the United States. If the statute be construed as authorizing the striking of the answer, and the taking of judgment by default, for failure to answer interrogatories, solely as punishment for contempt and without any regard to the substance of the interrogatories or the mature of the discovery sought, this objection would seem to be well taken. [citations omitted.] If on the other hand, the refusal of a party to attend and testify at trial, or to give his deposition, be treated as an implied admission of the facts at issue on his part, the same as the failure to deny the allegations of a pleading, we think the statute is free from constitutional objection. From a party's refusal to testify it may well be presumed that, if his testimony were given, it would sustain the cause of action or defense of his adversary, and we think that this is a presumption the law and the Courts have a right to indulge. On the same principle, the refusal of a party to answer interrogatories may be treated as an implied admission of the facts in relation to which discovery is sought. But, if there are numerous issues in a case, and a discovery is sought as th only one of these issues, for failure to make discovery as to one, can only be justified on the theory that the judgment is given as a punishment for failure to make discovery, and it may well be doubted whether such a proceeding can be sustained... Id. at 32. Emphasis added.

The Washington Court has recently ruled again on the due process issue, in an appeal pending at the time this matter was before it, that

> The trial court's discretion is not without limits... Due process considerations also require that before a trial court dismisses an action or counter claim, or renders a judgment by default, there must have been a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial...

> We adopt these rulings and hold that when a trial judge chooses one of the harshest remedies allowed under CR 37(b), the reasons for that choice should be clearly stated on the record. We further hold that when the most severe sanction of default or dismissal is ordered, it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed... Sneidegar v. Hodderson 53 Wn.App.476 (Feb. 1989).

In this case, the trial court failed to find any prejudice to defendant's and failed to consider lesser sanctions. Obviously, making the defendants liable for any percentage the potential co-defendants may have owed could have allowed the case to go foreword without dismissing it and awarding over $50,000 to plaintiffs without a trial.

2. THIS DECISION ALSO CONFLICTS WITH THE U.S. SUPREME COURT DECISIONS, AND SPECIFICALLY, THE STATE COURT MISCONSTRUED THE APPLICABLE CASE LAW.

In Hovey v. Elliot, 167 US 409, LEd 215, 17 S. Ct. 841 [1987], the U.S. Supreme Court considered:

> Whether a Court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a Defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt of court. 167 US at 413.

The court held that a default judgment, entered after striking a Defendant's answer was punishment for refusing to obey an order of the court, was void for want of due process of law. 167 US at 333-37.

In the subsequent case, Hammond Packing Co. v. Arkansas, 212 US 322, 53 L. Ed 530 29 S. Ct. 370 [1908], the Supreme Court upheld a default judgment taken following a Defendant corporation's failure to comply with a court order to produce designated books and records. The Court

distinguished Hovey as involving default as mere punishment, as opposed to the situation in Hammond where the default taken was justified by the right of the Courts to create a presumption flowing from the failure to produce material evidence. 2R US at 350. In Societe International Pour Participations Industrielle et Commercials, S.A. v. Rogers, 357 US 197, 2 LEd [2] 125, 78 S. Ct. 1987 [1958]; the Supreme Court reviewed the Hovey and Hammond cases and stated that:

> "These decisions established that there are constitutional limitations upon the power of Court, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

A party who fails to produce discovery opens itself up to being held in contempt of court and the court as a consequence may make such orders in regard to the failure as are just, but the Court cannot deny to that party the right to defend the action as mere punishment as that would deprive that party of a constitutional right. Instead the purpose of any order by the Court should be a balance the rights of the parties so that the contemptor does not profit or benefit from that act.

As a matter of law it is presumed by the Court that evidence withheld would if produced, contradict that party's contentions and support the requesting party's side is not unreasonable.

In the present case the failure to disclose the address of the codefendants was clearly not material to issues presented in the complaint; e.g. whether fees were owed for legal services.

There is no presumption which can logically flow from Petitioner's failure to disclose the address which would justify striking the Aquarian foundations answer in toto. The striking of the Appellant's pleading was clearly done merely to punish Appellants. The contumacy of a party may justify his punishment for contempt, but it does not justify the taking of his property and giving it to another.

Clearly, the Ruling of the commissioner in the Court of Appeals is in opposition to decisions of the United States Supreme Court and decisions in other circuit courts as well as Washington case laws. Specifically, the order at p.4 [APPENDIX C] misconstrues the Hammond case by not requiring an act of dismissal to be justified by prejudice to the non producing party. Default is a harsh sanction not favored in the law, as indicated above. The Commissioner's Ruling

which resulted in confirming the default again denied Petitioners due process and erred in application of the law.

The court is petitioned to vacate the default judgment as violative of the due process rights of petitioners

Dated this _____ day of _____ 1989.

Jean Schiedler-Brown & Assoc., P.S.

_____

Jean Schiedler-Brown
Attorney at Law

APPENDIX A

SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

LAW OFFICES OF EDWARDS & BARBIERI, a professional service corporation, Plaintiff, vs. THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, and KEITH MILTON RHINEHART, a single person; KATHI BAILEY and the marital community composed of KATHI BAILEY and WES BAILEY; TONI STRAUCH AND JOHN DOE STRAUCH; ILSE TAYLOR; and LILLIAN YOUNG and the marital community compsed of LILLIAN YOUNG and STEVEN YOUNG, Composed of Defendants.	No. 84-2-09847-3 ORDER STRIKING ANSWER, IMPOSING COMPENSATORY TERMS, AND ORDER OF DEFAULT

THIS MATTER having come on regularly before the above-entitled court upon the motion of the Plaintiffs and the court having considered the pleadings and affidavits and certificates filed in this

case and the prior orders of the court, and being fully informed and based upon the Motion For An Order Striking Answer And For Entry of Default and the court being fully advised, now therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

(1) The answers of defendant Keith Milton Rhinehart and of defendant the Aquarian Foundation are each stricken.

(2) The defendant Keith Milton Rhinehart and the defendant The Aquarian Foundation are each hereby declared to be in default. Plaintiff may prove their claim in the manner provided for proof of default judgments ex-parte in that department of this court.

(3) The defendant The Aquarian Foundation and the defendant Keith Milton Rhinehart are jointly and severally obligated to pay to the plaintiffs the sum of $932.50 as a compensatory award if defendants are able, at some future date, to reinstate this lawsuit and vacate the Order of Default. If attorney's fees are ultimately awarded against the defendants The Aquarian Foundation and Keith Milton Rhinehart then the court shall take into account the amount of terms previously paid to plaintiff. If this compensatory award has not been paid prior to entry of the judgment, this compensatory award shall be included as

a part of that juedgment and shall serve to reduce dollar for dollar the fees that otherwise would have been awarded.

Dated this 25th day of October, 1985.

Jerome M. Johnson/s/
J U D G E

Presented by:

EDWARDS & BARBIERI

By _____
Harold Goodfriend /s/
Attorney for Plaintiff

B/418H

APPENDIX B
SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LAW OFFICES OF EDWARDS & BARBIERI, a professional service corporation	)	No. 84-2-09847-3
Plaintiff	)	ORDER DENYING MOTION TO VACATE
THE AQUARIAN FOUNDATION, a not-for-profit corporation, and KEITH MILTON RHINEHART, a single person; KATHI BAILEY and WES BAILEY; TONY STRAUCH and the marital community composed of TONY STRAUCH and JOHN DOE STRAUCH; ILSE TAYLOR: and LILLIAN YOUNG and STEVEN YOUNG,	)	(Clerk's Action Required)
Defendants	)	

The Clerk of the Court is directed to enter a judgment as directed herein.

This matter having come on regularly upon the motion of the Aquarian Foundation and Keith Milton Rhinehart, and the court being fully advised, now, therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendants' motion to vacate the judgment in this case is denied.

DONE IN OPEN COURT this 19th day of March, 1987.

_____/s/_____
JUDGE

Presented by:

EDWARDS & BARBIERI

By: _____/s/_____
Malcolm L. Edwards
Attorney for Plaintiff

ets/44381

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, and KEITH MILTON RHINEHART, a single person,	
Appellants	No. 20268-5-I
v.	COMMISSIONER'S RULING GRANTING MOTION ON THE MERITS
LAW OFFICES OF EDWARDS & BARBIERI, a professional service corporation	
Respondent.	

The Aquarian Foundation and Keith Milton Rhinehart (Foundation) appeal the denial of its motion to vacate a judgment and of an order disbursing funds. The Law Offices of Edwards & Barbieri have filed a motion on the merits pursuant to RAP 18.14. The commissioner has heard oral argument and has determined the motion should be granted.

FACTS

In 1984, Edwards & Barbieri sued to recover attorney fees allegedly owed by the Foundation for services rendered in several law suits. By interrogatory, Edwards & Barbieri sought the names and addresses of additional defendants. The Foundation refused to provide an address for two of these defendants and Edwards & Barbieri moved to compel an answer. This motion was granted, subject to a protective order allowing Edwards & Barbieri to use the information solely for the purposes of service of process and documents. The trial court's order specifically provided that "should [the

Foundation] fail to comply with the terms of this order they shall be held in default and their answer stricken." The Foundation still refuses to provide the information and Edwards & Barbieri moved for an order of default pursuant to CR 37. The trial court conditionally granted the motion, giving the Foundation additional time to comply with the prior discovery order. When the Foundation still failed to provide the information, the trial court struck the Foundation's answer and a judgment was subsequently entered in favor of Edwards & Barbieri. The Foundation appealed and a motion on the merits affirming the trial court's decision was granted in Cause No. 17405-3. A motion to modify and a petition for review by the Supreme Court were both denied. The mandate was issued on March 13, 1987.

On March 4, 1987, Edwards & Barbieri moved to disburse the funds held in the registry of the court as payment of its judgment. On March 13, the Foundation moved to vacate the judgment and, on March 18, sought a continuance of any disbursement until it had an opportunity to seek review in the United States Supreme Court. After hearing, the trial court denied the motion to vacate and ordered the funds disbursed to Edwards & Barbieri. The Foundation appeals.

ISSUES

1. Did the trial court err in denying the Foundation's motion to vacate the judgment?

2. Did the Trial court err in refusing to stay disbursement of the funds held in the registry of the court?

3. Is Edwards & Barbieri entitled to attorney fees on appeal?

CRITERIA FOR DETERMINING WHETHER TO GRANT A MOTION ON THE MERITS

RAP 18,14 (e) provides:

> A motion on the merits will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the... commissioner will consider all relevant factors including whether to issues on review

> (1) are clearly controlled by settled law, (2) are factual and supported by the evidence, or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.

In applying these criteria, the commissioner determines that issues presented are clearly controlled by settled law.

DECISION

ISSUE 1. The standard of review for a motion to vacate a judgment under CR 60 is whether the trial court has manifestly abused its discretion. In re Adamec, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983). The Foundation argues that the trial court abused its discretion, contending that vacation was warranted under CR 60 (b) (1), (5) and (11).

CR 60 (b) (1) provides for relief from judgment as a result of "[m]istakes, inadvertence, surprise, excusable neglect or irregularities in obtaining a judgment or order." In order to prevail on a CR 60 (b) (1) motion, the moving party must establish (1) that there is substantial evidence to support, at least prima facie, a defense to the asserted claim, (2) that the moving party's failure to act was due to mistake, inadvertence, surprise or excusable neglect, (3) that the moving party acted with due diligence after entry of the judgment and (4) that no substantial hardship will result to the opposing party. White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1986). A motion to vacate under CR 60 (b) (1) must be brought within one year after the entry of judgment. CR 60 (b).

In applying these rules to the present case, it is clear that the trial court did not abuse its discretion in denying the motion under this provision. The underlying judgment which the Foundation seeks to vacate was entered on October 25, 1985. The motion to vacate was filed on March 13, 1987, approximately 17 months later. Therefore, the motion under CR 60 (b) (1) was untimely and relief was foreclosed. Hayward v. Hansen, 29 Wn.App. 400, 404, 628 P.2d 1326 (1981), remanded on another issue, 97 Wn.2d 614, 647 P.2d 1030 (1982). Even if the motion had been timely brought, there was no showing that a prima facie defense existed. The Foundation presented only the conclusory allegations of its attorney. Such allegations are insufficient to meet the test. Commercial Courier Svc., Inc. v. Miller, 13 Wn. App. 98, 104, 533 P.2d 852 (1975). The Foundation therefore did not

meet the required showing under CR 60 (b) (1) and the trial court did not err in denying the motion.

A judgment may also be vacated if it is void. CR 60 (b) (5). A judgment entered by a court which has jurisdiction over the person and subject entered by a court which has jurisdiction over the person and subject matter, even if containing irregularities or errors of law, is not void but merely voidable. In re Marriage of Ortiz, 108, Wn.2d 643, 649-50, 740 P.2d 843 (1987) (quoting Dike v. Dike, 75 Wn.2d 1, 8, 448 P.2d 490 (1968)). An order which is not void, but merely erroneous, is not subject to collateral attack. Bresolin v. Morris, 86 Wn.2d 241, 245, 543 P.2d 325 (1975); Freise v. Walker, 27 Wn. App. 549, 553, 619 P.2d 366 (1980).

The foundation argues that the judgement was void for want of due process. This contention is without merit as the court had jurisdiction over the parties and the subject matter. Pamelin v. Indus., Inc. v. Sheen-U.S.A., Inc., 95 Wn.2d 398, 403, 622 P.2d 1270 (1981). Further, there was no violation of due process. The Foundation relies on Hovey v. Elliot, 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841 (1897), in which the Supreme Court held that a default judgement entered as punishment for contempt was a denial of due process. However, the rule of Hovey was modified in Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350-51, 53 L. Ed. 530, 29 S. Ct. 370 (1909), which held that a state court may strike an answer and enter a default judgement if the defendant fails to produce evidence which the court has ordered produced. The rationale is that due process is secured by a presumption that the refusal to produce such evidence is done in bad faith and is an admission of lack of merit. See also National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1976); 4 L. Orland, Wash. Prac. § 5484 (1983). In Associated Mortgage Investors v. G. P. Kent Constr. Co., 15 Wn. App. 223, 228, 548 P.2d 558 (1976), the Washington State Court of Appeals held that entry of a default after violation of a discovery order "is not a denial of due process where the order setting forth the prospective sanction is made for the purpose of compelling discovery and where defendant is allowed a reasonable time to comply with the order." In this case, the Foundation was given ample notice that a default would be entered if it continued to willfully defy the court's discovery order. Nevertheless, the Foundation persisted in its failure to produce the required

records. There was no violation of due process. Therefore, there is no merit to the Foundation's claim under CR 60(b)(5).

The Foundation also contends that the court could vacate the judgement under CR 60(b)(11), "[a]ny other reason justifying relief from the operation of the judgement." The only reason suggested by the Foundation, however, is the denial of its right to due process, occasioned by its prior attorney's alleged failure to apprise the court of its assumed lack of authority to enter the judgement. This is essentially the same argument raised under CR 60(b) (5).

> Relief pursuant to CR 60(b) (11) should be confined to situations involving extraordinary circumstances not covered by any other section of the rule . . . .
>
> . . .
>
> . . . The reasons permitted by CR 60(b) (11) must relate to 'irregularities which are extraneous to the action of the court and go to the question of irregularity of its proceedings.'

State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982) (quoting Marie's Blue Cheese Dressing v. Andre's Better Foods, 68 Wn.2d 756, 758, 415 P.2d 501 (1966)). The Foundation has not established any irregularity requiring vacation under this section. The trial court did not err in denying the motion to vacate under CR 60 (b) and this contention is without merit.

ISSUE 2. The Foundation also argues that the trial court erred in refusing to continue the motion to disburse funds until it had applied for relief to the United States Supreme Court.

In November 1985, the Foundation deposited $50,317.70 into the registry of the court to act as a supersedeas and garnishment bond. See RAP 8.1(b). When the mandate issued on March 13, 1987, the stay granted by the posting of supersedeas pursuant to RAP 8.1 terminated and Edwards & Barbieri had the right to enforce its judgement. RAP 8.6. The fact that the Foundation wished to seek review by the United States Supreme Court did not require this court to stay issuance of the mandate for the length of time necessary to secure a decision in that court. RAP 12.6.

The Foundation argues that the trial court's refusal of the continuance rendered its potential appeal to the United States Supreme Court moot, because it was required to pay the

judgement before a final adjudication. This argument is without merit. Even had the United States Supreme Court taken review and reversed the judgement of the trial court, that court could have required Edwards & Barbieri to return the money to the Foundation, together with interest. The trial court therefore did not err in denying a continuance and in disbursing the funds held by the court.

ISSUE 3. Edwards & Barbieri seek attorney fees on appeal, relying on the contract between the parties, RAP 18.9 and RCW 4.84.185.

The fee contract between the parties provided that if a dispute arose over fees and Edwards & Barbieri substantially prevailed, it would be entitled to reasonable attorney fees and litigation expenses. Edwards & Barbieri was awarded attorney fees in the underlying judgement and on the prior appeal to this court and should, under the contract, be awarded attorney fees for this appeal. West Coast Stationary Eng'rs Welfare Fund v. Kennewick, 39 Wn. App. 466, 477, 694 P.2d 1101 (1985). In addition, the appeal is frivolous under RAP 18.9, as there were "no debatable issues upon which a reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). Edwards & Barbieri has filed an affidavit pursuant to RAP 18.1 seeking attorney fees of $3, 042.90. Review of the affidavit demonstrates that the hourly rate requested and the time appear to be reasonable and attorney fees in the requested amount are hereby awarded. Now, therefore, it is hereby

ORDERED that the motion on the merits is granted and the decision of the trial court is affirmed; and, it is further

ORDERED that the Foundation is to pay the Law Offices of Edwards & Barbieri $3,042.90 in attorney fees for this appeal.

Done this 11th day of April, 1988.

/s/
JoAnne K. Thompson
Court Commissioner

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, and KEITH MILTON RHINEHART, a single person,	
Appellants	No. 20268-5-I
v.	ORDER GRANTING MOTION TO EXTEND TIME AND DENYING MOTION TO MODIFY AND TO CORRECT RECORD
LAW OFFICES OF EDWARDS & BARBIERI, a professional service corporation	
Respondent.	

Appellants The Aquarian Foundation and Keith Milton Rhinehart have filed a motion to extend time to file a motion to modify the commissioner's ruling granting a motion on merits, a motion to modify and a motion to correct the record. A panel of this court has considered the matter pursuant to RAP 17.7 and State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985), and has determined that the motion to extend time should be granted, and that the motions to modify the commissioner's ruling and to correct the record should be denied. Now, therefore, it is hereby

ORDERED that the motion to extend time is granted; and, it is further

ORDERED that the motion to modify and the motion to correct the record are denied.

Done this 21st day of November, 1988.

_____/s/_____

_____/s/_____ _____/s/_____

APPENDIX E

The Supreme Court
State of Washington

February 28, 1989

Ms. Jean Schiedler-Brown
Attorney at Law
606 Post Avenue #101
Seattle, Washington 98104

Edwards & Barbieri
Mr. Malcolm Edwards
6501 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104

Re: Supreme Court No. 55805-1 - The Aquarian Foundation, et. al. v. Law Offices of Edwards & Barbieri

Court of Appeals No. 20268-5-I

Counsel:

The above entitled petition for review was considered by the Court this February 28, 1989, petition for review calendar.

The petition was denied by order number 187/184 filed on February 28, 1989

Sincerely,

_____/s/_____
C.J. Merritt
Supreme Court Clerk

CJM:mja

APPENDIX F

U.S. CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

CR 37 (b) (2) (C)

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

• • •

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgement by default against the disobedient party;

• • •

APPENDIX H

Superior Court No. 84-2-09847-3
Appeals Court No. 20268-5-I
Supreme Court No. 55805-1

IN SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

LAW OFFICES OF EDWARDS & BARBIERI,
a professional service corporation,

Plaintiffs,

vs.

THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, and KEITH MILTON RHINEHART, a single person,

Defendant.

NOTICE OF PETITIONER FOR CERTIORARI
TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

Defendants herein hereby petitions for certiori of the Washington State Supreme Court denying discretionary review on February 28, 1989, of the Court of Appeals, Division I, decision, dated April 11, 1989. This appeal is taken pursuant to 28 USC 1257 and 28 USC 2101 [c], and 28 USC § 2403 [b] may be applicable. The Attorney General of the State of Washington will be served a copy of this notice.

Dated this 25 day of May, 1989

Jean Schiedler-Brown
Attorney for Defendants
606 Post Avenue
Suite 101
Seattle, WA 98104
(206) 223-1888

Superior Court No. 84-2-09847-3
Appeals Court No. 20268-5-I
Supreme Court No. 55805-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LAW OFFICES OF EDWARDS & BARBIERI,
a professional service corporation,

Plaintiffs,

vs.

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Defendant.

NOTICE OF PETITIONER FOR CERTIORARI TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

RECEIVED
MAY 25 1989
COURT OF APPEALS
STATE OF WA

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IN THE SUPREME
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LAW OFFICES OF EDWARDS & BARBIERI,
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Attorney for Defendants
606 Post Avenue
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APPENDIX I

The due process question was preserved in the Motion to Vacate below, which briefed the issue, presented at page 3 of the motion as:

ISSUES:

1. The judgment is void and the court has no discretion but to vacate it.

2. Denial of due process and a default judgment in this circumstance is a manifest injustice requiring the judgment to be vacated.

On appeal to the Court of Appeals, petitioners argued that the due process violation constituted a manifest injustice and voided the default. See Appendix C. where the Appellate Court reviews and considers these arguments.

On petition to the Washington State Supreme Court, this issue was further preserved and briefed, and presented on page one of the Petitions For Review as follows:

C. ISSUES PRESENTED FOR REVIEW

1. Does it violate a Defendant's constitutional right to due process to strike Defendant's answer and enter a default judgement as a sanction for failure to produce discovery?

In each State Court level, petitioner relied upon U.S. Supreme Court caselaw and authority for the 14th Amendment to the U.S. Constitution.